

WD File



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

June 9, 1999

John McCray
2470 Cobblestone
Idaho Falls, ID 83404

Re: Your Letter of June 6, 1999 Regarding Draft Guidance for Distribution of Alder Creek Water Rights and Flows, Water District 34; and Your Letter of June 6 to Norman Young Regarding the Order for Measuring Devices and the Pending Notice of Violation.

Dear Mr. McCray,

Mr. Young and I have reviewed your comments regarding the Department's draft guidance document. We have also reviewed your response to the Pending Notice of Violation and the order requiring measuring devices and controlling works. Mr. Young and I have discussed both of your letters and he asked that I prepare one response on behalf of IDWR.

Part I. Draft Guidance Document

A final version of the guidance document will be forwarded to you under a separate cover letter. The final version will include several revisions based on the comments you submitted.

Items 1., 2. and 4. of your letter - Alder Creek as a tributary to the Big Lost River

I have revised the document to clarify more emphatically that Alder Creek is a tributary of the Big Lost River. It seems there is perhaps a misunderstanding regarding our direction about a futile call. However, we do both seem to agree that Alder Creek water may at certain times be used to satisfy Big Lost River rights on the Darlington Ditch.

The point that I think you raise under item 1 is that Alder Creek water should be used to fill Big Lost River rights on the Darlington Ditch that are senior to the Alder Creek rights when a futile call is determined. The department disagrees with this position.

The purpose of a futile call on Alder Creek or any tributary is to provide better use of the tributary source to those who have rights from that source when the water will not reach downstream natural channels. If junior tributary right holders are not entitled to water under a futile call, then there would be no point in even discussing or providing direction concerning a futile call.

Section 2, page 4 of the draft guidance document, states:

'...that **any** flow reaching the Big Lost River will be adequate to help other rights unless the Big Lost River will not reach the most immediate downstream diversion.'

This means that a futile call on Alder Creek can only be determined if the flow of Alder Creek does not reach the river or if the Big Lost River does not reach the most immediate downstream diversion on the river below Alder Creek. Given this directive and your statements that water in lower Alder Creek always reaches the river, then I suspect that a futile call determination will be a very infrequent event.

Section 2A on pages 4 and 5 provides that if the loss on the creek between the Darlington and Vanous Ditches is greater than 50 percent, then the watermaster must seek approval from the director to turn the flow of Alder Creek into the Darlington Ditch and account for that water as being delivered from the Big Lost River. This scenario is **not** a futile call as described in the preceding paragraph. Under this scenario, Alder Creek water can be delivered to Big Lost River rights on the Darlington Ditch that have priorities earlier than 1928.

Item 4 of your letter provides the following recommendation:

This greater than 50% loss needs to be compared directly with the loss attained when the water is traveling twice the distance to the river in order to (reach) Shane Rosenkrance's diversion. Only when that loss is considerably less than any loss to the river, is a futile call justified.

It seems that these statements confuse a futile call with the directive we provided under section 2A, pages 4 and 5 of the draft document. Again, this latter directive is not the same as a futile call. Therefore, there should be no need to compare losses as you suggest since the Alder Creek water in this case can be delivered to Big Lost River right holders on Darlington Ditch with priorities senior to 1928 or even 1908, assuming that those priorities are not already satisfied.

Please keep in mind that Alder Creek right holders on the Darlington Ditch may also hold Big Lost River rights, own shares of storage water or be entitled to Big Lost River-storage water rotation credits that are delivered and administered by the Big Lost River Irrigation District (BLRID). These users may also have senior priority natural flow rights from the Big Lost River. The watermaster has no real authority over how credits, storage water and shrink is delivered or recorded internally by the BLRID on the Darlington Ditch. It may not be appropriate to assume that an Alder Creek right holder who receives water from the BLRID is necessarily receiving Alder Creek water.

Items 3. and 5. - Determination of Futile Call by Watermaster Doug Rosenkrance and objection to assignment of Alder Creek watermaster duties, Section G, page 6:

Under item 3, you object to Doug Rosenkrance making any determination of a futile call. Item C, page 3 of the guidance document provides a citation of Rule 20.04 of the Rules Governing Water Distribution in Water District 34. It is perhaps not clear from the citation of this rule, but IDWR's interpretation of this rule is that the watermaster must first consult with director of the department regarding a futile call determination. The final decision of a futile call rests with the director of the department. The department will often rely on measurements made by the watermaster in making this determination. With respect to Alder Creek, the department will make an effort this year to make miscellaneous measurements of the creek gains/losses between the Darlington and Vanous Ditches. The guidance document has been revised to clarify that the director of IDWR will make the final determination of any futile call.

In regards to section G, page 6, I concur with your suggestion that this is a 'weak statement'. I'm not sure how else I can phrase this recommendation given the limited options provided by the Idaho Code regarding appointment of assistant watermasters. Section 42-609, Idaho Code empowers the watermaster to employ 'suitable' assistants. If he elects to do so, the director has authority to approve the selection. If he elects not to select an assistant, then the director has no power to force the hiring of an assistant. Please note that this same section affords you and any other user the opportunity to suggest a suitable assistant if you are not happy with the watermaster's decision of delegation. I have revised this section to recommend that such a suggestion must have the support of more than one right holder on the creek and that it be forwarded to both IDWR and the watermaster.

Item 6 – Exclusion of a Permanent Measuring Device at Alder Creek-Darlington Ditch Confluence.

The draft document does appear to include one sentence in section 2, page 6 that could be construed to mean that measuring device requirements are not applicable to the Alder Creek-Darlington Ditch confluence. However, careful reading of the remaining portion of the document clearly shows that this is not IDWR's intent. The draft document has been revised to remove any confusion regarding this point.

IDWR concurs with your position that all parties on the creek should install measuring devices that have the same degree of accuracy. IDWR will work with the parties toward meeting this objective. Scott King of our office was in that area this week and began investigating some of the measuring devices. This does not mean that all parties are required to install the same type of measuring device. Obviously, different sized ditches and conditions often require different measuring devices.

Part II. – Pending Notice of Violation and Order Requiring Measuring Devices and Controlling Head Works

The first paragraph of your letter to Mr. Young asks for an extension of time in which to comply with the measuring device and controlling head works requirement as set forth in the order. Please note that the order did allow the June 7 deadline to be extended if construction or installation of devices or head gates is not practical due to high seasonal runoff in the creek. It is our understanding that there are high flows in the creek at this time. Therefore, the time in which to complete the installations is extended to June 28, 1999. If high water persists, additional time may be requested.

Your head gate should be a type that is capable of being locked. IDWR suggests that you either replace or modify the gate that you already purchased so that it is capable of being locked.

Doug Rosenkrance's head gate is a type that can be locked. We have some questions regarding the use of the gate as a measuring device. Scott King of IDWR investigated this gate on June 8. Depending on Mr. King's findings, IDWR will require Mr. Rosenkrance to do whatever is necessary so that his diversion can be measured accurately. It is your decision if you wish to personally check Mr. Rosenkrance's water use. For your own legal protection however, I suggest that you first contact Mr. Rosenkrance. Otherwise, you may be liable for trespassing. If Mr. Rosenkrance denies you access and you believe that his diversion is not lawful, then you may send a written complaint to my attention and I will see that the matter is investigated.

You state that it is your belief that as a water right holder, you are entitled to use as much flood water as you see fit. You also state that this 'historical practice' is currently being performed by multiple water users and that with respect to 'beneficial use', this water is directed to flow over one of your old alfalfa fields.

I do not doubt your assertion that a number of users in the Big Lost River valley are currently diverting excess flows due to high runoff. The Idaho Supreme Court ruled in 1998 that IDWR could not include a general provision in SRBA decrees that allows diversion of excess water. Prior to this ruling, IDWR had included such a general provision in the Basin 34 (Big Lost basin) director's report. This provision has since been removed by IDWR pursuant to the Supreme Court decision. It may seem absurd to many users, but if the department is to follow the decision given by the court, then water users in the Big Lost or anywhere else technically should not be diverting excess flows. Regulation of diversion rate is an ongoing issue in the adoption of water management rules. For this reason and for now, IDWR has not instructed watermasters to regulate excessive diversions during periods of high water. However, excessive rates of diversion must be used for the uses and places of use authorized by existing water rights. This means that an individual can not divert excess water to 200 acres if his or her rights are limited to only 100 acres.

I am not certain how to interpret the language in your letter, but I am concerned about your statement that you are directing water to flow over 'old' alfalfa fields. The department


recognizes that you have a right to divert water for irrigation of 25 acres. If you have been diverting water to more than 25 acres and continue to do so after receiving this letter, then IDWR will issue a notice of violation. The department and water district will not limit your excessive flow during this high runoff period unless the water is not being put to beneficial use or is being used on lands or for purposes that are inconsistent with your existing rights. Additionally, the Department will not pursue any action if the flow of the creek has jumped the banks or is naturally flooding land that is beyond one's control.

If the Department is aware of other excessive diversions during periods of high flow that are being used in a manner inconsistent with existing water rights, then those diversions must also be regulated by the watermaster, or through a Notice of Violation issued by the department if necessary. This assumes also that the diversion or use is not the result of natural flooding, or that it is unreasonable to prevent overflow.

Finally, your letter states that your address information has been updated with IDWR for a long time. I have checked our water right records more thoroughly and found that you did indeed file a change of address with the department. Your new address was not carried forward to the new and updated database record that was created after the SRBA court awarded you the 25-inch right. Please disregard the form I sent you and any correspondence where I asked you to update your address. I sincerely apologize for the mistake and confusion.

Thank you for the prompt response to the pending notice of violation and for submitting comments on the draft guidance document.

Respectfully,



Tim Luke
Water Distribution

Cc: Norman C. Young, IDWR
Doug Rosenkrance, Watermaster
Ron Schnabel, BLRID Manager